STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 5, 2011
v	No. 294927 Ionia Circuit Court
THOMAS ALFRED YOUNG, Defendant-Appellant.	LC No. 2009-014296-FH

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, and of being a prisoner in possession of a weapon, MCL 800.2834. Defendant's convictions arose from the jailhouse stabbing of fellow prisoner Melvin Chancy. The trial court sentenced defendant as a first habitual offender, MCL 769.10, to concurrent terms of 95 months to 15 years' imprisonment for the assault conviction and two to five years' imprisonment for the weapon possession conviction, to be served consecutive to the sentences for which he had already been imprisoned. On appeal as of right, defendant contends that his trial was tainted by the ineffective assistance of defense counsel and the misconduct of the prosecutor. We affirm defendant's convictions and sentences.

At the trial, the parties disputed only the identity of the person who stabbed Melvin Chancy. The stabbing occurred in a communal shower when no guards were present. At least five prisoners had crowded within the shower area, adding chaos to an already dangerous situation. Both the prosecution and defense relied on conflicting stories offered by the prisoner witnesses, and grainy, dark video surveillance footage. The prosecution, of course, argued that the evidence showed that defendant committed the offense; defendant argued that another inmate was the actual culprit.

Chancy and defendant were housed in neighboring cells and apparently had an argument two days before the incident. Chancy testified that when he entered the shower room only one other prisoner was present. While Chancy showered, defendant entered the room with two other men. Chancy recounted that defendant held a homemade knife, lunged at Chancy, stabbing him multiple times while the two men wrestled on the floor. Chancy claimed that he escaped his

attacker by placing him in a headlock until he choked and passed out. Chancy asserted that he got a good look at his attacker and positively identified defendant.

Fellow inmate David Martin testified that he was in the shower room and witnessed defendant and Chancy wrestling on the floor. Martin did not see defendant holding a knife; however, Martin found on a knife on the floor after the fight, which he picked up and threw away. Jeremy Schuh, another inmate, testified that defendant later confessed to him that he stabbed Chancy.

Inmate Jason Ross, on the other hand, testified that Chancy gave him legal forms as a bribe so Ross would falsely testify that he heard defendant confess to the stabbing. Inmate Mark Swanigan testified that Chancy told him that he did not know who attacked him, but planned to falsely accuse defendant. Defendant testified on his own behalf that he witnessed David Martin attack Chancy in the shower.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims he is entitled to a new trial based on the ineffective assistance of defense counsel. Defendant raised this issue for the first time on appeal in a motion to remand for an evidentiary hearing. This Court denied defendant's motion and, therefore, no evidentiary hearing was held. As such, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel "is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews the trial court's findings of fact for clear error and constitutional determinations de novo. *Id*. at 484-485.

To prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-part *Strickland*[1] test adopted by our Supreme Court in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

[1] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 657 (1984).

> outcome. [*People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (internal citations and quotations omitted).]

Given the presumption that counsel employs "sound trial strategy," we may not second guess counsel's actions with the benefit of hindsight. *Pickens*, 446 Mich at 330. Moreover, the fact that a strategic decision was ultimately unsuccessful or was not the "best" choice does not necessarily establish that counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant first argues that trial counsel was ineffective in calling inmate Eric Higgins as a defense witness. Trial counsel's "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Based on the record before us, we cannot conclude that defense counsel's strategy was constitutionally deficient.

Higgins testified that he was in the shower room at the time of the attack. Higgins indicated that he saw defendant enter the room, pull a knife from his towel and attack Chancy. Higgins was "100% sure" that defendant carried the knife into the shower, and recalled that defendant stabbed Chancy "a couple of times in the wrist and stomach." Chancy then fell to the floor with defendant on top of him and defendant stabbed Chancy multiple times in the side. Higgins further testified that Chancy was able to take the weapon from defendant. At that point, defendant was exhausted and Chancy was able to stab defendant four times in the back. Higgins testified that he was "100% sure" that Chancy stabbed defendant at that point. Chancy threw the weapon toward two other inmates and left the room. Higgins stated that defendant stood up about ten seconds later, retrieved the knife and threw it away.

The testimony provided by Higgins was inculpatory in that Higgins positively identified defendant as Chancy's attacker. However, we disagree with defendant's assertion that Higgins's testimony could serve no purpose for the defense. Defense counsel's strategy was to highlight the inconsistencies between Higgins's testimony and the known physical facts. Specifically, guards conducted a strip search of defendant shortly after the incident. There were no injuries on defendant's body at that time. Accordingly, Higgins was 100% incorrect that Chancy stabbed defendant four times in the back. Moreover, Higgins admitted that the video evidence proved that Martin threw the knife into the garbage can, not defendant.

By impeaching the testimony of this eyewitness, defense counsel could motivate the jury to question the accuracy or veracity of the other prisoner eyewitnesses. This fight occurred in cramped quarters with at least five grown men present. Witness testimony and video footage proved that the scene was chaotic with prisoners moving around in order to avoid becoming collateral damage in the fight. In the bedlam, one man could easily be confused for another. Defense counsel's ultimate goal was to bolster the main defense theory that David Martin, not defendant, actually committed the stabbing.

Defense counsel foreshadowed this strategy in his opening statement and reiterated it in closing argument. In opening, counsel asserted that the prisoner eyewitnesses provided varying versions of the events and were often internally inconsistent. Defense counsel further stated that the video evidence showed David Martin and "McQuiter" handling the knife and never showed

defendant in possession of the weapon. In closing argument, defense counsel argued that the true assailant would have bodily injuries from wrestling on the shower floor and hand injuries from holding the crude knife, yet defendant emerged uninjured. Defense counsel pointed the finger at Martin instead, noting that the guards did not search him after the scuffle and so he could have hidden his injuries. Defense counsel pointed to video evidence that Martin suspiciously returned to the shower after the fight and argued that Martin must have been rinsing off blood. In relation to Higgins's testimony, defense counsel specifically argued:

> Now the prosecution witnesses certainly are clearly all over the board in terms of testimony here and even more so what's interesting about Mr. Higgins, which prosecution choose [sic] not call [sic] and I called, was the testimony for them at the preliminary examination was again pretty bazaar [sic] in terms of what he claimed occurred in this shower area. I mean he was 100% certain that the knife was wrestled away by my client, from Chancy from my client [sic] and that he was stabbed four times in the back, clearly saw it. And again we go back to the fact that Mr. Young had no injuries. There was no injuries observed on him. He didn't have to go get medical treatment and clearly if he was stabbed with this knife four times in the back there would have been injuries.
>
> Prosecutor also wants you to believe that after they wrestled around on the ground that my client was choked out, that he was unconscious . . . . Took him considerable period of time to come to and really had no bearings. Well, we'll show the video again. You'll see my client walk out of the shower area, he's not shaking his head, he's not holding his throat from being choked. He's clearly not showing any visible contributing or corroborating evidence to support any of the theories or stories from the prosecution witnesses . . . . The camera never lies as some people say.

The defense strategy was obviously unsuccessful as the jury convicted defendant, but counsel's strategy decision was not constitutionally deficient. Moreover, it is unlikely that that this evidence tipped the scales in the prosecution's favor given the various other inmate accounts identifying defendant as the attacker. In other words, there is not a "reasonable probability that, but for counsel's" decision to present Higgins's testimony, "the result of the proceeding would have been different." *Carbin*, 463 Mich at 600.

Defendant also challenges trial counsel's failure to call Christopher Schnoor as a defense witness. "[T]he failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotations omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Schnoor swore in an affidavit that Chancy told him that he was afraid of the individual who actually stabbed him. Chancy claimed to be afraid of his actual assailant and falsely accused defendant, hoping to gain the favor of prison officials by doing so. This testimony merely cumulated other defense evidence that Chancy falsely accused defendant and, therefore, was not necessary to establish a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004) (the defendant's ineffective assistance claim failed where

counsel actually provided the proffered "substantial defense" but declined to present cumulative evidence in support). Accordingly, defendant's challenge lacks merit.

Defendant challenges his counsel's acquiescence to the Department of Corrections (DOC) recommended minimum sentence of 95 months, which was the highest possible sentence in the guidelines range. Defendant argues that defense counsel "completely failed to advocate on his client's behalf" in this regard. Defendant relies on *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), which held that a defendant is not required to make a "specific showing of prejudice" where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." This Court generally applies the *Strickland* standard, which requires a showing of prejudice, in reviewing claims of ineffective assistance of counsel. *People v Gioglio*, ___ Mich App ___; ___ NW2d ___ (published April 5, 2011), slip op at 11. However, this Court will presume the existence of prejudice pursuant to *Cronic*

> where the defendant was completely denied the assistance of counsel at a critical stage, where the defendant's trial counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and where the circumstances under which the defendant's trial counsel functions are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. [*Id.*, slip op at 12 (internal quotations omitted).]

We have found no authority to support defendant's contention that counsel is *per se* ineffective for acquiescing to the length of the recommended minimum sentence and defendant failed to provide any legal support for his position. A defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) (internal quotation and citation omitted). Accordingly, we decline to presume that defendant was prejudiced and analyze this claim under *Strickland* instead. Defendant's challenge must fail under *Strickland* as he has not shown that the court would have imposed a lower minimum sentence "but for counsel's error." *Carbin*, 463 Mich at 600.

Defendant also argues that the cumulative effect of the alleged errors mandate reversal. We disagree. To succeed on a cumulative error challenge, the defendant must show that actual, consequential errors occurred. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Here, defendant failed to raise any legally significant errors in counsel's performance and, therefore, cannot establish cumulative errors requiring a new trial.

II. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor engaged in misconduct and thereby denied him a fair trial. "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). The prosecutor's comments must be considered in light of the defendant's arguments and the evidence presented at the trial. *Id.*

Defendant first challenges the prosecutor's questioning of witness Schuh about defendant's religious beliefs. Specifically, the prosecutor asked Schuh why he feared for his safety as a result of his testimony against defendant. Schuh responded that defendant was part of a religious organization that "has a lot of pull" inside the prison. The prosecutor asked Schuh to explain and he began describing the religious origins of the particular organization. The implication of this testimony was that defendant's religious organization functioned as a gang within the prison.

The prosecutor's line of questioning was clearly improper. MCL 600.1436 prohibits a witness from being "questioned in relation to his opinions on religion." Our Supreme Court has interpreted the statute to also prohibit a witness from testifying regarding another person's religious opinion and beliefs. *People v Bouchee*, 400 Mich 253, 264; 253 NW2d 626 (1977). The purpose of the statute is to "strictly avoid any possibility that jurors will be prejudiced against a certain witness because of personal disagreement with the religious views of that witness." *People v Jones*, 82 Mich App 510, 516; 267 NW2d 433 (1978).

Defense counsel did not raise a contemporaneous objection, but the court *sua sponte* halted the line of questioning and instructed the jurors to disregard the witness's comments. We presume that jurors follow the instructions as given by the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1999). Defendant raised no objection to the substance of the court's curative instruction. As defendant failed to preserve his challenge to the prosecutor's questioning or the court's response, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, the trial court "act[ed] in a swift and commendable manner in cutting off the improper religious questioning," *Dobek*, 274 Mich App at 75, and we reject defendant's contention that this brief reference to religion affected the outcome of his trial.

Defendant also contends that the prosecutor vouched for the credibility of the lead investigating officer. Defendant challenges the following line of questioning:

> *Q.* Okay. And then once you gather all your evidence, what do you do then with it? What happens in this case, what do you do next?
>
> *A.* When the investigation is complete, if I feel that there is sufficient evidence to show that in this case [defendant] committed a crime I present that case to the prosecutor[']s office.
>
> *Q.* Okay, so when you examined all the evidence, then with your experience as an officer in this case, after you investigated it, did you draw a conclusion in this matter?
>
> *A.* Yes.
>
> *Q.* Okay and then what was that conclusion?

Defense counsel objected and the court immediately gave a curative instruction that the jury should disregard the question. Although a prosecutor engages in misconduct when he vouches

for the credibility of his witnesses, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), this error was quickly remedied and did not render the trial unfair.

Finally, defendant contends that the prosecutor improperly vouched for the credibility of witness Larry Manning during rebuttal closing argument. During questioning, defense counsel implied that Manning was not being truthful. Specifically, defense counsel played video footage of Manning walking through the cell block, entering a cell, and exiting with an object in his hand. Defense counsel contended that this object was the homemade knife used to stab Chancy. Manning denied this accusation and testified that he walked through the cell block with magazines underneath his arm. He claimed that he entered a cell where he exchanged the magazines for cigarettes. He then exited the cell carrying only the cigarettes.

During rebuttal closing argument, the prosecutor made the following statement:

> He talks about Manning and the fact that Manning is going down the hall and he supposedly reaches into the cell and Manning testifies that he had magazines under arm [sic] and that's what he [sic] handing him. We have the video. You can take it back. Go back and look at it. I've looked at it and I believe him and if you look at it close when he's walking down the hall I believe you will see something under - -

Defense counsel objected and the court immediately instructed the jury to disregard the prosecutor's comment.

The prosecutor's comment does not amount to reversible error. The prosecutor's argument was responsive to defense counsel's theory that Manning was lying and actually carried the knife into the shower room. The prosecutor should not have stated "I believe him" and should have allowed the video evidence to speak for itself. However, "otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense." *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Defendant's right to a fair trial was protected by the trial court's immediate curative instruction to the jury and defendant is not entitled to further relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly